AHMAD ABID ABDUL HAMID v. SUBANGI MUNUSAMY

HIGH COURT MALAYA, KUALA LUMPUR
S NANTHA BALAN JC
[CIVIL APPEAL NO: 12BNCVC-56-07-2015]
30 OCTOBER 2015

TORT: *Defamation – Slander – Slander by conduct – Whether conduct can amount to slander*

TORT: *Defamation – Malice – Slander – Defamation based on conduct amounting to slander – Unceremonious off-loading of senior flight stewardess at insistence of co-pilot – Existence of personal grudge based on previous incidents – Whether defendant's action actuated by malice*

TORT: *Defamation – Defences – Qualified privilege – Existence of malice on part of tortfeasor – Whether malice defeats defence of qualified privilege*

EVIDENCE: *Documentary evidence – Admissibility of – Admissibility of email – Maker of document failed to appear in court as witness – Whether criteria under s. 73A(1) and (2) of Evidence Act 1950 established*

EVIDENCE: *Statement – Statement of person who could not be called as witness – Statement issued in course of employment – Whether statement issued in course of employment admissible as evidence in absence of maker – Evidence Act 1950, s. 32(1)(b)*

The respondent/plaintiff ('plaintiff'), a senior flight stewardess, and the appellant/defendant ('defendant'), a pilot, were both employed by Malaysian Airlines System Berhad ('MAS'). The plaintiff had filed a claim against the defendant at the Sessions Court for defamation based on conduct amounting to slander following an incident that had occurred on 23 September 2013 whereby the plaintiff, who was on duty as a flight stewardess on board Malaysia Airlines flight MH04 (Kuala Lumpur to London), was unceremoniously off-loaded by MAS in the presence of her co-workers and passengers due to the insistence of the defendant who was the first officer on board the same flight. The plaintiff had alleged that the event of off-loading was most humiliating and had tarnished her reputation. On the other hand, the defendant had alleged that even though he may have insisted, but the final decision to off-load was made by MAS and not by the defendant. The defendant had claimed to be relieved of any legal responsibility or liability for the humiliation suffered by the plaintiff and pleaded defence of qualified privilege. At the end of the trial, the Sessions Court had allowed the plaintiff's claim and ordered the defendant to pay damages to the plaintiff in the sum of RM20,000 and trial costs of RM5,000. The defendant was further ordered to tender a letter of apology in writing to the plaintiff. Dissatisfied with the decision of the Sessions Court, the defendant had filed this appeal

against the plaintiff. The plaintiff had also filed a cross-appeal against the defendant in respect of quantum of damages and trial costs. Thus, the main issue for the court's determination in this appeal was whether an action for slander is maintainable based purely on conduct rather than words used by a tortfeasor.

Held (allowing defendant's appeal and dismissing plaintiff's cross appeal with parties to bear their own costs):

(1) The defendant was the *causa causens* of the off-loading and although the decision and implementation was done by MAS, the person who was principally responsible for the off-loading was the defendant. Even though the defendant was not the one who made the decision and not the person who escorted the plaintiff out of the aircraft, the only conclusion that could be reached was that the defendant was responsible and liable for the conduct of the off-loading event. (paras 38 & 39)

(2) The learned Sessions Judge was satisfied that all efforts had been made to locate Captain Syed Ismail so that the subpoena could be served on him. The criteria under s. 73A(1) and (2) of the Evidence Act 1950 had been established and Captain Syed Ismail's e-mail was therefore admitted under s. 73A of the Evidence Act 1950. The e-mail was also admissible under s. 32(1)(b) of the Evidence Act 1950 as it was issued by Captain Syed Ismail in the course of his employment or discharge of his professional duties. (paras 41 & 42)

(3) The defendant had absolutely no basis for raising the complaint or to highlight his so-called fear about the plaintiff as it was plain and obvious that this was a personal grudge and he was actuated by malice when he succeeded in getting the plaintiff off-loaded from the aircraft on the day in question. Such malice as there was on his part, defeated any qualified privilege which he would have been able to assert in the ordinary course of things. (para 48)

(4) The damage done to the plaintiff's reputation *vis-à-vis* her colleagues or superiors and in the eyes of her employer, MAS, was far greater that any transitory reputational damage that might have occurred when she was humiliated in the presence of passengers who may or may not have known her. (para 49)

(5) The parties had proceeded on the basis that a cause of action in slander was sustainable if it was based on defamatory gestures or conduct. However, the Court of Appeal in *Proton Parts Center Sdn Bhd v. Mohamed Zainal & Another Appeal* ('*Proton*'s case') had rejected the proposition that conduct was capable of amounting to slander. The ruling in *Proton*'s case effectively deprived an innocent victim who had suffered tremendous humiliation, of a legal remedy by way of damages for slander from the party responsible for causing harm to the reputation because of the type

of 'conduct' which signifies to onlookers that there was something very wrong or sinister about the person. By reason of *stare decisis*, the decision in *Proton*'s case was binding and the defendant's appeal must therefore be allowed. (paras 71, 73, 90 & 92)

Case(s) referred to:

Abdul Rahman Talib v. Seenivasagam & Anor [1964] 1 LNS 2 HC ***(refd)***

Code Brilliant Sdn Bhd (Dalam Penerimaan Dan Likuidasi) & Ors v. Heng Ji Keng & Ors [2012] 1 LNS 873 HC ***(refd)***

Dalip Bhagwan Singh v. PP [1997] 4 CLJ 645 FC ***(foll)***

Devan & Associates v. TSR Bina Sdn Bhd [2015] 5 CLJ 17 CA ***(foll)***

Harris Solid State (M) Sdn Bhd & Ors v. Bruno Gentil Pereira & Ors [1996] 4 CLJ 747 CA ***(refd)***

Manivannan Muniandy & 2 Ors (Kesemuanya berniaga di atas nama dan gaya Syarikat Percetakan Thirumugam) v. Bank Kerjasama Rakyat Malaysia Berhad [2014] 5 AMR 481 HC ***(refd)***

Mason v. William Hill Organisation Ltd (Unreported) ***(refd)***

Pardeep Kumar Om Parkash Sharma & Anor v. Abdullah Sani Hashim & Other Cases [2008] 1 LNS 669 CA ***(dist)***

Proton Parts Centre Sdn Bhd v. Mohamed Zainal & Another Appeal [2010] 1 CLJ 348 CA ***(foll)***

Shen & Sons Sdn Bhd v. Jutawarna Development Sdn Bhd & Ors [2015] 8 CLJ 125 HC ***(refd)***

Siti Salma Yusoff v. CIMB Bank Berhad; Tumpuan Auto Sdn Bhd (Third Party) [2011] 1 LNS 1621 HC ***(refd)***

Syed Husin Ali v. Sharikat Penchetakan Utusan Melayu Berhad & Anor [1973] 1 LNS 146 HC ***(refd)***

The Co-operative Central Bank Limited (In Receivership) v. Feyen Development Sdn Bhd [1995] 4 CLJ 300 FC ***(refd)***

Tun Datuk Patinggi Haji Abdul Rahman Ya'kub v. Bre Sdn Bhd & Ors [1995] 1 LNS 304 HC ***(refd)***

Watson v. Argles & Court (Unreported) ***(refd)***

Zulkifli Hussein v. Ambank (M) Berhad [2015] 1 LNS 618 HC ***(refd)***

Legislation referred to:

Defamation Act 1957, ss. 2, 5

Evidence Act 1950, ss. 32(1)(b), 73A(1), (2)

Rules of Court 2012, O. 15 r. 6(2)(b), O. 16 r. 1

Other source(s) referred to:

Duncan and Neill, *Butterworths Common Law Series on Defamation*, 4th edn, para 3.05, pp 22-23

For the appellant - Mohd Iskandar Ismail (Ily Zalikha Shahrinan with him); M/s Basharuddin Fa'izie Iskandar

For the respondent - Sangeet Kaur Deo (Jeremy Vinesh Anthony with her); M/s Karpal Singh & Co

[Appeal from Session Court, Kuala Lumpur; Civil Suit No: B53F-16-10-2014]

Reported by Thirunavakarasu Vijayan

A

JUDGMENT

S Nantha Balan JC:

Introduction

B **[1]** This is an appeal by the defendant against the decision of the Sessions Court which allowed the plaintiff's claim for defamation (slander). The basis for the claim for slander was the "conduct" of the defendant as set out in para. 6 of the statement of claim. A key issue to be determined in this appeal is whether an action for slander is maintainable based purely on conduct rather than words used by a tortfeasor.

C

The Judgment

[2] These are my grounds in respect of an appeal against the decision given by the learned Sessions Court Judge on 29 June 2015, which allowed the claim by the respondent/plaintiff and ordered the appellant/defendant to D pay damages to the plaintiff for slander in the sum of RM20,000 (with interest at 5% from the date of filing of the writ until full settlement) and costs of RM5,000. She also ordered the defendant to tender a letter of apology in writing to the plaintiff and to copy the same to the plaintiff's solicitors and to Malaysia Airlines Systems Berhad ("MAS") who was/is the employer to E the plaintiff and defendant.

The Off-loading Incident

[3] I shall refer to the parties as per their original titles in the Sessions Court ie, the appellant and respondent as defendant and plaintiff respectively. The plaintiff was at all material times employed by MAS as a stewardess. F The defendant was also employed by MAS as a pilot. The plaintiff's claim is for defamation (slander) based on an incident on 23 September 2013, whereby the plaintiff who was on duty as a flight stewardess on board Malaysia Airlines flight MH04 (Kuala Lumpur to London), was unceremoniously "off-loaded" or taken off the flight due to the insistence of the defendant who G was the first officer (co-pilot) on board the same flight. At the outset it is important to note that there was absolutely nothing that the plaintiff said or did before the flight took off that justify the off-loading. She was merely a passive party and had no control over events that unfolded just before the flight took off. Initially, the plaintiff filed this action against the defendant H and one Ms Lee Siew Poh ("Ms Lee") who was the in-flight supervisor. The claim against Ms Lee was withdrawn before the trial.

The Appeal And Cross Appeal

[4] The judgment sum of RM20,000 (with interest and costs), totalling RM25,768 has since been paid into court pending disposal of the appeal I herein. The Sessions Court has however granted a stay of the order requiring the defendant to issue a letter of apology, pending disposal of the present appeal.

[5] The defendant is unhappy with the decision against him and thus the present appeal. The plaintiff is equally unhappy with the award of damages and the amount of costs and has cross appealed. The plaintiff has asked that the damages be enhanced to around RM50,000 and for the trial costs to be increased to RM10,000.

The History Of The Inter-personal Dispute

[6] At the material time of the incident that occurred on board flight MH04, the plaintiff had been in service with MAS for about 18 years as a flight stewardess. Her employment record was otherwise unblemished. The defendant had been a pilot with MAS for about 8 years. The incident on 23 September 2013 was the sequel to two earlier unpleasant incidents between the plaintiff and defendant whilst they were both travelling on previous flights.

Incident On 6 June 2013

[7] The first incident occurred on board flight MH73 on 6 June 2013 (Hong Kong to Kuala Lumpur). The plaintiff was on duty during the said flight whereas the defendant and his family (wife and children) were travelling as passengers. There was an incident between the plaintiff and the defendant's wife, where it is alleged that the plaintiff had abruptly adjusted the seat of the defendant's wife whilst she was breastfeeding her child.

[8] The plaintiff denies that the defendant's wife was breastfeeding her child when the seat was adjusted. What is important is that the plaintiff did attempt to adjust the seat and the defendant's wife took offence to what the plaintiff had done. Thereafter, there was some exchange of words between the plaintiff and the defendant and his wife. The details of this incident are not critical. What is important is that the incident became the catalyst for the next incident which occurred on yet another flight when the plaintiff and defendant were both on duty on the same flight.

Cockpit Incident On 8 July 2013

[9] The next encounter between the plaintiff and defendant was on 8 July 2013. The plaintiff and defendant were together on flight MH2 from Kuala Lumpur to London. Nothing untoward took place initially between the plaintiff and the defendant, until the plaintiff was asked to see the defendant in the cockpit of the aircraft. I refer to this encounter as "the cockpit incident". This took place about half an hour after the aircraft had taken off from Kuala Lumpur International Airport. The defendant had apparently intimated to the commander of the flight (the pilot) (Captain Nik Badrul Hisham) that he wanted to speak to the plaintiff to settle some dispute that they had earlier on flight from Hong Kong. The plaintiff was summoned and she went into the cockpit. The defendant questioned the plaintiff about her behavior on 6 June 2013 and not unsurprisingly, there was an exchange of words between the plaintiff and the defendant. Both sides threatened each other.

[10] The incident is best described in an email from Captain Nik Badrul Hisham in response to an email from Encik Zolkipli Md Isa (Security Department - MAS) who was investigating the incident. The email reads as follows:

> For your info I have known FSS Subangi for quite sometime now I was the Captain on the B737-400 in the early 90's. On the said flight to London, FO Abid requested to call FSS Subangi to the cockpit to settle some dispute they had earlier on flight from Hong Kong. As the Commander I granted the request and after the service had completed I ask the IFS to ask FSS Subangi to the cockpit. It is a normal practice for the technical crew to summon any crew to the cockpit if need be.
>
> I cannot recall how long she was in the cockpit but could be around 15 to 20 minutes. When she came to the cockpit she was a bit agitated and she was expecting what it was all about. The two of them was trying to convince one another who was at fault and the conversation was a bit tense. I was just pretending to be doing my work and did not get myself involved until FSS Subangi said **"you do not know who my boyfriend is"** to which FO Abid replied **"you do not know who my friends are"** and FSS Subangi said **"I will make sure you do not reach home after flight"**. Hearing this I quickly intervene and told FSS Subangi that what had said constitute to be a threat and if anything happen to FO Abid that she would be the first person to be picked up by the police. I also told her that I am the witness to the threat that she make. She does not even apologise for the remark that she made but insisting that she was right with regard to their dispute. There are other remarks which I find that was uncalled for which she said during their conversations but threat remark is serious and should not be taken lightly for it is not a joke nor was uttered in jest.
>
> I did managed to get them to shake hands after advising both of them to settle their differences amicably. I could not recall at any instance FO Abid stopping FSS Subangi leaving the cockpit during their conversation. (emphasis added)

[11] It is clear that both the plaintiff and defendant exhibited childish and unprofessional behavior and ended up threatening each other. The defendant claimed that because of the plaintiff's threat, he and his family were in danger. He promptly notified the relevant parties in MAS. Upon his return from the trip he lodged a police report on 11 July 2013 about the plaintiff's threat.

Defendant's Police Report

[12] This is what is stated in the defendant's report:

> Pada 9 July 2013 jam lebih kurang 0400hrs (waktu Malaysia) sewaktu dalam penerbangan dari Kuala Lumpur-London semasa di dalam penerbangan saya telah meminta keterangan dari salah seorang dari pramugari nama: Subangi Munusamy (Staf No: 0302633) tentang masalah kabin. Beliau terus tidak puas hati kerana saya bertanyakan hal ini kepada beliau. Beliau mengugut saya dengan berkata "You don't know who is my boyfriend. I'll make sure you don't arrive home after flight". Saya terkejut

dengan ugutan tersebut. Semasa beliau berkata begitu telah disaksikan oleh Kapten Nik Badrul Hisham. Tujuan saya buat laporan polis takut jadi apa-apa hal ke atas saya di kemudian hari. Inilah laporan saya.

[13] Not unsurprisingly, the defendant's police report states nothing about his own threat to the plaintiff. Nevertheless, all of this resulted in an investigation conducted by MAS where the plaintiff was issued with a warning letter from MAS with respect to the words she uttered to the defendant on 8 July 2013.

Warning By MAS To The Plaintiff

[14] It is imperative to note that the plaintiff was not reprimanded in respect of the later event ie, the off-loading incident. The warning by MAS was only in respect of the words which she uttered during the "cockpit incident". The warning contained in a letter dated 21 November 2013 read as follows:

Performance and Resource Management has received a report from First Officer Ahmad Abid Abdul Hamid that he was being threatened by you whilst onboard MH002 dated 08 July 2013 for sector KUL/LHR. FO Ahmad Abid had lodged a police report at KLIA Sepang.

In his police report dated 11 July 2013, FO Ahmad Abid claimed you threatened him by saying "you don't know who my boyfriend", I'll make sure you don't arrive home after flight". This report was made upon his arrival after operating the flight, MH003 10 July 2013 for sector LHR/KUL as he felt unsafe.

During the Fact Finding Inquiry conducted by Security, you did mention you did make a remark but denied making the disparaging remarks as mentioned above. However, these remarks were overheard by the Commander of the flight.

The Department finds your explanation unacceptable and not truthful.

You have thereby committed an act of misconduct as stated in the Company's standing orders Acts Of Misconduct Appendix 1.2.1. "Violence, abusing, assaulting or threatening to assault or to do any injury to fellow employees or supervisors or others within the Company or outside the Company's premises".

The Department reminds you of your duty as a Cabin Crew where your behavior and decorum must be at its level best at all times. We also wish to put on record the advice given by the Panel on the importance of being professional at all time, which you have been receptive to.

On a similar note, the Department also expects you to make serious efforts by taking all preventive measures and precautions by not repeating such an act of misconduct. Should you repeat the same or similar offence, the Department will not hesitate to take a more serious action against you including referring you to Human Resources.

A As such, it is the recommendation of Human Resources that you are hereby issued with this official Letter of Warning, arising from the report and subsequently the findings by Security Department on the incident.

Off-loading Incident On 23 September 2013

B **[15]** The last incident in the rather unfortunate and unhappy trilogy of events in this human melodramatic conflict between the plaintiff and defendant is the event which took place on 23 September 2013 when the plaintiff and defendant were both scheduled to be on flight MH4 (Kuala Lumpur to London). The defendant was the first officer on the flight. He found out that the plaintiff was on duty on the same flight. The defendant C informed the commander of the flight, Captain Syed A Jalil, that the plaintiff had to be off-loaded as he had fears about her. To determine precisely the narrative of the events prior to the off-loading, I gravitated to the most neutral source of evidence to piece together the events that took place on that day before the plaintiff was unceremoniously "off-loaded".

D **[16]** In this regard, I found that the most neutral source was the unadulterated narration by Captain Syed A Jalil Syed Harun in his email dated 27 September 2013 to Captain Basil. In his email, Captain Syed A Jalil states the following:

E Dear Captain Basil,

I am writing in to inform the chronology of the above matter, At ODC first officer Ahmad Abid upon printing the GD for the flight had approached me and highlighted his fear and predicament of operating the flight with the FSS due to recent spate between both of them. As commander of the flight I told him to be a professional and just go for F the flight as I cannot off-load any of them as they posed no safety hazard for the flight. They could be separated one in front and one at the back. Also I advised him to leave all the differences at home as a professional. FO Abid insisted one of them must step down so I suggested that he did that on his own accord and he proceeded to inform the office of Captain Kamaruddin. FO Abid was relieved of his team A first officer and left at G Ode to pursue his objective upon arrival at the aircraft the IFS was informed of what was brewing in the office and we proceeded with our preflight duties. About half an hour before departure the IFS duly informed me that her office called her to informed that the FSS was to be removed from the flight and I saw Mr Peter Grey came to the aircraft to accompany the FSS out of the aircraft. From my own professional H opinion the above incident should not happen if the office could have called both of them up earlier to settle whatever their differences. The flight continued with 20 cabin attendants. Though after flight I was confronted with half of the set questioning me what really happen which I answered that the decision made was from the office. The crew complaint of tiredness and handling difficulties during flight due short of I crew. Again, I regret that the department took the measure to off-load the FSS because in this matter nobody was proven guilty or innocent. Both of them should have been asked to continue the flight and leave.

Captain Syed A Jalil A380.

[17] And so, it is quite clear that on 23 September 2013, the plaintiff was "off-loaded" from the flight due to the defendant's insistence that she be removed from the flight. Of course, the decision to off-load the plaintiff was a decision that was ultimately made by MAS and not the defendant, but it is equally true that the plaintiff would not have been off-loaded, if not for the defendant's insistence that she be off-loaded.

[18] The defendant had given an ultimatum to MAS, that either the plaintiff is off-loaded or he will step down. Needless to say, if the defendant had stepped down then it would have been disastrous for MAS as it would have been impossible to find a replacement for a first officer at such short notice. MAS took the decision to off-load the plaintiff because of the defendant's intolerant stand and not because she was a safety risk. But to all those who watched the incident of the plaintiff being off-loaded, the perception was or would have been that there was "something seriously wrong with her".

Off-loading - Implications

[19] In this regard, it is important to note that from the perspective of MAS as the airline operator, "off-loading" is a serious matter and occurs when there is a behavioral or other problem with an individual. According to the written policy of MAS as per its operations manual - Part A section 8.2.3, off-loading will be initiated when the commander of the flight is of the view that a person is, *inter alia*, a hazard or is a risk to herself or to other persons or to property or to the aircraft. Here, the decision to off-load the plaintiff was not a decision that was taken by the commander of the flight but rather it was taken by MAS because of the demand that was made by the defendant. As I said, the event of off-loading was most humiliating to the plaintiff and her reputation was tarnished as she did nothing wrong on the flight to deserve this treatment. It is indisputable that the defendant was the cause of the off-loading. I will come back to this theme shortly.

[20] Before going further, it is imperative to appreciate that "off-loading" is a generic term used to describe the event whereby a person (usually a passenger) is removed from the aircraft and this is mostly due to behavioral issues which may affect the safety of the aircraft, the flight or that of the crew or passengers. It is quite uncommon and extra-ordinary for a crew member to be off-loaded.

[21] Hence, "off-loading" is in no way a benign event and anyone who is off-loaded is mostly regarded as being taken off the flight due to safety reasons. Indeed, for a crew-member to be off-loaded is very serious as it carries with all sorts of sinister behavioral connotations and imputations.

Impact Of Off-loading (Flight Operations And Reputation Of The Crew)

[22] According to the evidence of Vincent Tan (chief steward) who was on the flight, off-loading is usually associated with safety issues. He said that off-loading of a flight stewardess would naturally have a significant impact on

the flight operations and on the plaintiff's reputation as well. Victor Tan testified on behalf of the plaintiff. He said (as per his witness statement):

Victor Tan - Chief Steward

3. How are you related to the facts of this case?

On 23 September 2013, I was scheduled to work onboard MH4 flying from Kuala Lumpur to London. At about 1 hour before the departure time, I was on the main deck, First Class carrying out my ground duties when I saw the Pilots and the Technical Crew come on board the Plane. The First Defendant was not amongst them. Once they went into the cockpit, the paged for the In flight Supervisor which is the Second Defendant to come into the cockpit. I continued performing my ground duties when the Second Defendant emerged from the cockpit and she spoke to me and informed me that the Captain told her that they were going to off-load the Plaintiff and told the Second Defendant to follow instructions from the company. I asked her why and what was the reason for the Plaintiff to be off-loaded and she said that it was a personal matter.

4. What happened next?

When the First Defendant boarded he went into the cockpit and after that Peter Grey came on board. I asked Peter why did he come on board, he said he came to see the Technical Crew. At this point, the passengers already started boarding. After a while, I saw the Plaintiff coming down the stairs and they left. We continued with the flight as planned.

5. What happened when you arrived in London?

Upon arrival in London, after we had checked into our hotel at the Holiday Inn in London and after our post flight briefing by the Second Defendant, a few of us saw that Captain Jalil was having a cigarette outside the hotel. We approached him and asked what actually happened. He told us that when the flight crew reported for a duty at the flight operation center, the First Defendant told him that either the Plaintiff is off-loaded or he will step down. He asked the First Defendant to settle it with the office.

6. What happened next?

I then made a CHIRPS Report as can be seen on page 15 of the Common Bundle where I informed the relevant departments about the incident that occurred on the flight on for them to do a follow up investigation into the incident. I stated that the crew was short numbered by 2 before the flight and when the Plaintiff was off-loaded, that increased the number to 3 which resulted in the crew being severely shorthanded and lacked manpower. I felt that procedure was not being followed because the First Defendant was holding the company to ransom by demanding that the Plaintiff be off-loaded due to some personal reason.

7. In your experience only in what situations can a crew member be off-loaded?

When the person is a threat to the flight or when the crew member does not have a valid safety license or that the safety knowledge is not up to standard. It cannot be done for personal reasons.

9. What is the usual procedure for a crew member to be off-loaded?

A flight crew member can only be off-loaded by the Commander of the Flight which is the main Pilot.

10. What is the perception of other crew members of a crew member that has been off-loaded?

They usually will think that something is wrong with that crew or maybe that the crew member does not have a valid safety license or does not have a high standard of safety knowledge.

11. What is the level of professionalism and competency of the Plaintiff as a flight stewardess?

She is a competent and professional crew member.

12. What is the effect of the Plaintiff being off-loaded on her competency and professionalism as viewed by the other crew members?

Her reputation will be stained and may cause other crew members to belief that she is not fit and proper to be a flight stewardess and that she does not have the proper character, and knowledge to be a flight stewardess. It leaves a bad effect on her competency and professionalism.

Plaintiff's Testimony - Reputational Damage

[23] I now refer to the plaintiff's testimony on the impact of the "off-loading" on her reputation. Her evidence (per her witness statement) is as follows:

24. Tell the Court what occurred on flight MH4 on 23 September 2013?

On 23 September 2013, I was scheduled to fly on MH4 from KL to London and at around 10 am, I was on duty at the Upper Deck Business Class Zone carrying out my preflight duties. The First Defendant was the Pilot for this flight. The Second Defendant approached me and said "I think the pilot got grudges with you. I am so sorry but you have to step down. Hassan will call you later. Please on your hand phone". I asked her "why must I step down". She said "we cannot fly without the pilot". She spoke to me at the side of the plane and this was seen by the other crew. She was not rude out just told me in a normal conversational manner. When I turned on my hand phone, I saw a few miscalls and I called back the number, Duty officer Awang picked up the phone and said "We will put you on standby for tomorrow to London". But I was angry and in a state of panic and can't remember the whole conversation

with Awang. I then just changed my shoes and left the plane. I had to remove by bags from the air plane which caused the flight to be delayed by an hour. I was seen leaving by a lot of passengers, flight crew and ground crew. Victor Tan who was the Chief Steward also saw me leave the plane. I saw from his body language that he was a bit upset at what happened to me.

27. In what manner were you told to leave the flight?

I was told to leave the flight in an unprofessional way without being given the proper and valid reasons for it in a written form or even orally. The first defendant used his personal issues with me to have me off-loaded in front of all my peers and even in front of passengers who has already started boarding the flight.

28. How did you feel when this happened?

I felt extremely embarrassed as I had to leave the flight in full view of all the crew members, passengers and ground crew. I also felt demoralised and victimised by the actions of the First Defendants. This had never happened to me before.

29. Did the First Defendant act professionally *via* his actions?

No. Not at all. Even if it is true that I allegedly made threats against his life, that, which it is denied, that happened about 3 months ago and in that 3 months no harm was done to him. He cannot be using his personal grudges against me to get me sent off a flight when his life was not in jeopardy at all.

30. As a flight stewardess with MAS, what is the usual perception of a flight stewardess who is told to leave the aircraft by other members of the crew?

It usually means that you have done something wrong or you have caused some problems or faced an emergency. If reflects badly on the stewardess that she is unprofessional and incompetent as a stewardess.

31. Do you feel you were fairly treated?

No. I felt bullied, intimidated and victimised. The first defendant got away with it because he was the pilot and I was just a flight steward.

32. Were the actions of the Defendant malicious in nature?

Yes. The first defendant was acting out of a grudge due to the incidents that happened on the previous flights. Further he held the company at ransom that day, in insisting that he would not fly the plane unless we are separated. In doing so he overstepped his professional boundaries and had acted maliciously by asking for me to be off-loaded although I posed no threat to the safety of the flight. He put the company in a position of having no choice at all as he threatened not to fly and the company could not afford to cancel the flight that was already boarding.

33. What are the losses that you sustained due to the actions of the Defendants?

I was severely embarrassed and traumatised due to the actions of the Defendants. My reputation was a stewardess of 19 years in service was affected as people had a bad perception of me after I was told to leave the plane.

[24] Looking at the matter in its totality, it is clear that the defendant harboured a grudge against the plaintiff, especially since nothing came out of the police report that he had lodged against the plaintiff and there was a lapse of about ten weeks since the "cockpit incident" on 8 July 2013. Also, since the "cockpit incident", there had been no contact whatsoever between the plaintiff and the defendant.

[25] Thus, the so-called fear and discomfort that the defendant claimed to have before the flight took off on 23 September 2013 was a personal grudge that he had against the plaintiff and was more a case of the defendant detesting the presence of the plaintiff on the same flight. Such feelings as were nurtured and festered within the defendant amounted to "malice" as there could be no other plausible reason to off-load the plaintiff other than to teach her a lesson.

[26] It is clear that the plaintiff was a passive victim to events that were unfolding and she had no say and no control. Clearly, there was no evidence of any lack of professionalism on the part of the plaintiff as would warrant her removal on 23 September 2013. What the defendant did by his insistence was to give MAS "*Hobson*'s choice" that is, they had no choice, and they did the only thing that could be done to ensure that there was no disruption to the flight: they "off-loaded" the plaintiff solely to appease the defendant.

[27] It is significant that the flight was already short of two crew members and with the off-loading of the plaintiff, the flight was short of three crew members. Thus, the in-flight crew members were naturally overworked and exhausted at the end of their flight. But that is just a separate issue: no doubt an important one from the safety and operational aspects of the airlines but it is not germane to the issue in this case.

Novus Actus Interveniens

[28] The next point is the issue of "*novus actus interveniens*" due to the decision by MAS to off-load the plaintiff. Here, the defendant claims that even though he may have insisted, the final decision to off-load was made by MAS and not by the defendant.

[29] In this regard, the defendant maintains that the decision by MAS to off-load the plaintiff amounts in law to a *novus actus interveniens* and that he is therefore relieved of any legal responsibility or liability for the humiliation which she had suffered by the off-loading incident.

[30] It is no doubt true that the decision to off-load the plaintiff was taken by MAS. Hence, the question is whether the fact that off-loading was done by MAS qualifies as a "*novus actus interveniens*" such that it absolves the defendant of any liability for the plaintiff's loss of reputation caused by the humiliating event of being "off-loaded" in the presence of her co-workers and passengers.

[31] In my view, for *novus actus interveniens* to apply, the act which is relied upon must be something that is fortuitous and unexpected or unforeseeable and must be such that it breaks the chain of events. If it is an event which flows naturally and foreseeability from the initial act of the tortfeasor, then it cannot be a *novus actus interveniens*.

[32] In this regard, the following statement of the law on *novus actus interveniens* by the Court of Appeal in *Devan & Associates v. TSR Bina Sdn Bhd* [2015] 5 CLJ 17; [2015] 3 MLJ 454 CA is applicable:

> [24] The principle of *novus actus interveniens*, which is a Latin term, it means a new intervening act. It is an act or event that breaks the causal connection between a wrong committed by the defendant and subsequent happenings. The new event relieves the defendant from responsibility for the happenings. As to the effect of this defence of *novus actus interveniens*, we would only allude to the decision of Justice James Foong J (as he then was) in the case of *Billion Origin Sdn Bhd v. Newbridge Networks Sdn Bhd & Anor (Yap Burgess Rawson International Sdn Bhd, third party)* [2006] 6 MLJ 768; [2006] 4 CLJ 113 at para (30) therein, where he had said:
>
> > This concept of *novus actus interveniens* acts in this manner: If a particular consequence of the defendant's wrongdoing is attributable to some independent act or event which supersedes the effect of the initial tortious conduct, then the defendant's responsibilities may not extend to the consequences of the supervening event. In short, if there is a break in the chain of causation then the original wrongdoer is not liable for starting the wrong - see *Clerk & Lindsell on Torts*, (17th Ed), para 2-24.
>
> [25] In fact, the working of this concept can be seen, as a further illustration, in the case of *Muirhead v. Industrial Tank Specialities Ltd* [1986] QB 507 where it was said by the English Court of Appeal at p 533, as follows:
>
> > In such a case there would be two contributory causes of the damage - the failure of the pumps, due to the negligence of the manufacturer, and the failure to attend at the fish farm, due to the negligence of the supervisor. I cannot see that the former could escape liability on the simple basis that he did not anticipate the negligence of the latter, especially when the purpose for which his goods were to be used was, as he should have appreciated, to preserve the health and lives of

> the fish. Only where the act or omission of another was of such a nature that it constituted a wholly independent cause of damage, ie, a *novus actus interveniens*, could the manufacturer escape all liability for the damage …
>
> [26] From the above, it is clear that the crucial point to consider is whether the last causative act constituted a wholly independent cause of damage. In the words of the Lord Justices in the *Muirhead*'s case, it is in a situation 'where the act or omission of another was of such a nature that it constituted a wholly independent cause of damage, ie a *novus actus interveniens*,' such that the original tortfeasor would escape liability for his initial wrong-doing.

[33] As stated earlier, the plaintiff's off-loading was the direct result of the defendant's conduct on 27 September 2013 when he insisted that she be off-loaded or else he would step down. It was either he steps down or she is taken off the aircraft. However, in his witness statement, the defendant says that he told Captain Kamaruddin (Head of Department) that he (the defendant) should be replaced and not that the plaintiff should be off-loaded.

[34] But, as was rightly pointed out by counsel for the plaintiff, the defendant never stated this in his defence and did not state that this was the case in his email to MAS which was sent on 29 September 2013. In any event, the defendant's stand in this regard, contradicts Captain Syed Jalil's version, which is that the defendant's stand was either the plaintiff is off-loaded or he (defendant) would step down.

[35] Before I touch on the admissibility of Captain Syed's email, I will address the point raised by the defendant which is that the plaintiff should have filed this action against MAS and not against him. Of course, it was open to the plaintiff to have sued MAS as it was they who decided that she be off-loaded and eventually it was a staff of MAS who escorted the plaintiff out of the aircraft.

[36] But, in the present circumstances, I do not see why the plaintiff could not sue the defendant as he was for all intents and purposes the "author" or the cause of the off-loading incident. Whilst I accept that the decision and implementation of the off-loading was done by MAS, it is equally true that MAS really had no choice and they off-loaded the plaintiff because of the defendant's intolerant attitude and insistence that she be off-loaded.

[37] In as much as the defendant says that the plaintiff should have sued MAS, it may equally be said that it was entirely open to the defendant to have brought MAS in as a co-defendant (O. 15 r. 6(2)(b) of the Rules of Court 2012) or as a third party (O. 16 r. 1 of the Rules of Court 2012). But the defendant chose not to add MAS as a party to the proceedings.

[38] As I said in the earlier parts of this judgment, the defendant was the *causa causans* of the off-loading and although the decision and implementation was done by MAS, the person who was principally responsible for the off-loading is the defendant.

[39] As such, even though the defendant was not the one who made the decision and not the person who escorted the plaintiff out of the aircraft, the only conclusion that can be reached on the unique circumstances of this case is that the defendant is responsible and liable for the "conduct" of the off-loading event, for which the plaintiff now seeks compensation for the immense humiliation and harm that was inflicted upon her reputation as an individual and more so as senior flight stewardess of MAS.

Admissibility Of Capt Syed's Email

[40] As I said earlier, I would rather rely on Captain Syed Ismail's email dated 27 September 2013 rather than to accept the defendant's version in his witness statement which is more in the nature of an afterthought. During the trial and before me, objection was taken in regards to the admissibility of Captain Syed Ismail's email. In so far as the admissibility of this email is concerned, the conclusion that I have reached is that there was no error or misdirection in the exercise of discretion by the learned Sessions Judge.

[41] In this regard, the learned Sessions Judge was satisfied that all efforts had been made to locate Captain Syed Ismail so that the subpoena could be served on him. She was therefore satisfied that the criteria under ss. 73A(1) and (2) of the Evidence Act 1950 had been established. The ruling by the Sessions Court Judge on this point is neatly captured in the following paragraph of her judgment where she says,

> Plaintif telah sedaya upaya cuba untuk memanggil Capt Syed A Jalil B Syed Harun ke Mahkamah iaitu melalui email pada 15.4.2015 dan panggilan telefon namun gagal dan tidak mendapat apa-apa jawapan.
>
> Plaintif telah memohon sapina pada 27.4.2015 dan telah diserahkan ke alamat yang diketahui oleh Plaintif, namun saksi itu masih gagal dikesan. Kehadiran saksi ini jika masih ingin dibawa ke Mahkamah akan memakan masa yang lama kerana tidak diketahui dimana beliau berada. Ini akan menyebabkan perbicaraan akan ditangguhkan untuk jangka waktu yang tidak pasti dan akan menggugat keadilan kes ini.
>
> Segala usaha Plaintif untuk cuba mengesan saksi ini telah mematuhi kehendak Seksyen 73A(1) dan (2) Akta Keterangan 1950, maka sewajarnya ID5 diterima masuk sebagai keterangan.

[42] She therefore admitted the e-mail under s. 73A of the Evidence Act 1950. However, in my view, the e-mail is also admissible under s. 32(1)(b) of the Evidence Act 1950 as it was issued by Captain Syed Ismail in the course of his employment or discharge of his professional duties.

[43] Section 32 of the Evidence Act 1950 reads as follows:

> Cases in which statement of relevant fact by person who is dead or cannot be found, etc, is relevant.

Section 32

(1) Statements, written or verbal, of relevant facts made by a person who is dead or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the court unreasonable, are themselves relevant facts in the following cases:

...

(b) when the statement was made by any such person in the ordinary course of business, and in particular when it consists of any entry or memorandum made by him in books kept in the ordinary course of business or in the discharge of professional duty; or of an acknowledgment written or signed by him of the receipt of money, goods, securities or property of any kind; or of a document used in commerce, written or signed by him, or of the date of a letter or other document usually dated, written or signed by him;.

Warning By MAS To The Defendant

[44] We may now examine the defendant's conduct from the perspective of MAS. In so far as MAS was concerned, the defendant's conduct *vis-à-vis* the cockpit incident on 8 July 2013 and the off-loading of the plaintiff on 23 September 2013 constituted misconduct and he was criticised in the strongest possible terms. The defendant was therefore issued with a warning by MAS *via* letter dated 24 January 2014. In that letter MAS states the following:

It has been reported that on 8 July 2013 while operating MH002 KUL/LHR that you had called FSS Subangi into the cockpit to discuss personal issues not related to the operations of the flight for a duration of more than 15 minutes. It was established that during the course of the conversation FSS Subangi uttered 'threatening remarks' to you after being harassed by you.

Subsequently on 23 September 2013 FSS Subangi was made upon discussion between two stake holders, ie OCC and Flight Operations, we believed that it was made for the best interest of the company.

Nevertheless, the matter would have not arisen if FO Ahmad Abid had maintained the highest level of tolerance and able to distinguish between work and personal issues;.

Plaintiff's Credibility

[45] The other point that was raised by counsel for the defendant is with regards to the plaintiff's credibility. He said that she was not truthful during cross-examination when she was asked whether she received a warning letter from MAS. I really could not see how her credibility had anything to do with the "off-loading". In any case, I looked at the notes of evidence where she was asked "twice" about the warning letter and on both occasions she denied

receiving a warning letter. Here, I find that the context in which the questions were asked are highly pertinent. I have reproduced the questions and answers (pp. 238 to 239 appeal record) and they are as follows:

Mik: Yes. Documents at page 10 and 11, Bundle A, Miss Subangi. You are aware of this letter issued by MAS to the First Defendant. You know the contents, right?

Subangi: Yes.

Mik: Please refer to page 11 of paragraph 3 of the letter, on the top left. Although the decision to offload FSS Subangi was made open discussion between two stakeholders OCC and Flight Operations, you got it?

Subangi: Yes.

Mik: My question is based on this letter by MAS the decision to off-load you was not come from the First Defendant?

Subangi: I disagree

Mik: You disagree?

Subangi: Yes.

Mik: So my next question, Puan, regarding the same bundle, did you receive the same warning letter against this incident?

Subangi: No.

Mik: I asked you once more, Miss Subangi. Did you receive any warning letter from MAS regarding the same incident?

Subangi: No.

[46] In my view, the plaintiff's answers were not untruthful. Here, it is important to note that counsel for the defendant was asking her about the incident relating to off-loading and when asked whether she received a letter from MAS regarding the "same incident", she answered "no". To my mind, that is a correct answer. Indeed, if counsel had asked her specifically whether she received a warning letter from MAS for the "cockpit incident" on 8 July 2013, then one would have expected an affirmative answer. Here, the question by counsel was not specific to the cockpit incident and was ambiguous at best. There is therefore nothing in her answer that impacts upon her credibility.

[47] As stated earlier, the off-loading of the plaintiff was due to the defendant's insistence and was completely caused by his intolerant attitude towards the plaintiff. There was a complete absence of professionalism on the part of the defendant. The defendant displayed behavior which was consistent with someone who exploited an opportunity to put the plaintiff in her place and humiliate her in the presence of the passengers and her fellow crew members.

Qualified Privilege

[48] The defendant has no doubt raised the defence of qualified privilege and this is predicated on a duty to notify MAS of the existence of any risk to the safety of the flight, which of course MAS had a corresponding duty to receive. But the point here is that the defendant had absolutely no basis for raising the complaint or to highlight his so-called fear about the plaintiff as it was plain and obvious that this was a personal grudge and he was actuated by malice when he succeeded in getting the plaintiff "off-loaded" from the aircraft on the day in question. In my view, such malice as there was on his part, defeats any qualified privilege which he would have been able to assert in the ordinary course of things.

[49] On the question of the extent of reputational harm to the plaintiff, I note that passengers on the flight were not called testify. But I do not think that it matters that passengers did not testify. The damage done to the plaintiff's reputation *vis-à-vis* her colleagues/superiors and in the eyes of her employer, MAS is far greater that any transitory reputational damage that may have occurred when she was humiliated in the presence of passengers who may or may not have known her.

The Plaintiff's Cross-Appeal On Damages And Costs

[50] Before I deal with the key legal issue as to whether there can be slander by conduct, I propose to deal with the cross-appeal on the issue of adequacy of damages and trial costs. In this regard, the plaintiff's complaint is that the award of RM20,000 and trial costs of RM5,000 was too low. I will deal with the award of damages first. Here, the learned Sessions Court Judge had stated in her grounds of judgment that she was awarding "aggravated damages". This is found in pp. 411 to 412 of the appeal record.

[51] The principle relating to appellate intervention on the issue of adequacy or inadequacy of quantum of damages is that ordinarily, an appellate court would be slow to interfere with the quantum of damages, unless it can be demonstrated on appeal that the damages are inordinately low and are disproportionate and/or do not reflect the gravity of the harm done to the victim of the tort. Unlike personal injury cases, for defamation, there is no "one size fits all" type of compendium of damages which can be used as a guide.

[52] Rather, in assessing damages for loss of reputation, the court will have to have regard to all the relevant circumstances and factors attendant upon the event in question and to give such damages as would be fair and reasonable and I might add, proportionate this context it would be relevant to refer the case of *Shen & Sons Sdn Bhd v. Jutawarna Development Sdn Bhd & Ors* [2015] 8 CLJ 125, at p. 125 where I had occasion to deal with this very topic of appellate interference on quantum of damages. In that case, I had made the following observations:

A [100] In any event, I did not think that RM150,000 was so outrageous or excessive as to warrant appellate intervention. The general rule in appeals of this nature is that the quantum awarded should not be interfered with unless it is so excessive as to be unreasonable. The principle in this regard was established by the then Federal Court in *Topaiwah v. Salleh* [1968] 1 LNS 161; [1968] 1 MLJ 284 FC which approved a passage from the B decision of Greer LJ in *Flint v. Lovell* [1935] 1 KB 354 CA where he said:

> … I think it right to say that this Court will be disinclined to reverse the finding of a trial judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a lesser sum. In order to justify C reversing the trial judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled. [see D p. 360]

(See also: *Tan Kuan Yau v. Suhindrimani Angasamy* [1985] 1 CLJ 429; [1985] CLJ (Rep) 323; [1985] 2 MLJ 22 FC at p. 23)

[53] In my view, the quantum of RM20,000 that was awarded would E ordinarily have been fair and reasonable if the claim was made by a passenger who was wrongfully and unfairly "off-loaded". However, here was a case of a senior crew member of 18 years service with MAS who had been unjustifiably "off-loaded" in full view of passengers and co-workers. The mental anguish, emotional, trauma, anger and hurt that was suffered by the plaintiff is therefore incalculable. As I said, ordinarily, an appellate would F not interfere with an award of damages, unless it was satisfied that the amount was so in ordinarily low or high as to fall outside the band of what would usually be regarded as a fair and reasonable figure.

[54] However, in the context of the appeal before me, I do think that given G the circumstances under which the plaintiff was unceremoniously off-loaded from the flight, it would be fair that a higher sum should be awarded, *albeit* that she is not someone who is well known socially, politically or in business circles. In this regard, it is important to note that slander of a person by way of his/her business, profession or calling is actionable without proof of damage. Section 5 of the Defamation Act 1957 is relevant and it reads as H follows:

> Slander affecting official, professional, or business reputation
>
> In an action for slander in respect of words calculated to disparage the plaintiff in any office, profession, calling, trade or business held or carried on by him at the time of the publication, it shall not be necessary to allege I or prove special damage whether or not the words are spoken of the plaintiff in the way of his office, profession, calling, trade or business.

[55] In my view, the plaintiff here is entitled to such damages as would be commensurate with the gravity of the harm to her reputation which was occasioned by the "off-loading" on 23 September 2013 in the presence of her fellow crew members and superiors and to the knowledge of her employer, MAS.

[56] No doubt, the defendant was eventually found liable for misconduct with respect to the "off-loading" but the real victim was the plaintiff as the act of being "off-loaded" symbolised her incompetency, unfitness, or that she was a security risk to the flight, these would have the cumulative effect of tainting her reputation in the eyes of her fellow workers and in the eyes of her employer, MAS.

[57] I am therefore impelled to the conclusion that the learned Sessions Court Judge erred in awarding a low sum of RM20,000 as "aggravated" damages ("ganti rugi teladan"). In my view, a sum of RM40,000 would be fair, reasonable and proportionate in the circumstances. Thus, on the plaintiff's cross-appeal on damages, I am of the view that appellate intervention is warranted. Also, the sum of RM5,000 as discretionary trial costs is far too low for a heavily contested trial of this nature. I am of the view that the trial costs should be increased to RM10,000.

[58] However, for reasons that will be obvious in the subsequent parts of this judgment, my conclusion on the plaintiff's cross-appeal must necessarily abide by the outcome on the defendant's appeal, which is on the main issue of whether conduct can amount to slander.

Whether Conduct Can Amount To Slander

[59] I turn now to the main issue which lies at the heart of the defendant's appeal and that is: whether "conduct" can amount to slander for purposes of a cause of action under the Defamation Act 1957.

[60] The starting point is the definition of "words" under the Act. Section 2 of the Defamation Act 1957 has defined "words" as including "pictures, visual images, gestures and other methods of signifying meaning". Therefore, it was submitted for the plaintiff that "words" do include "gestures or any other method of signifying meaning" and that the actions of the defendant and the off-loading event by which the plaintiff was taken off the flight is conduct and this falls within the definition of "words".

[61] Counsel for the plaintiff emphasised that it was the conduct of the defendant in causing the plaintiff to be off-loaded rather than any words which he may have used, that is the subject matter of this claim. Counsel referred to the following cases which touch upon the general principles on the law of defamation.

[62] The first case is *Abdul Rahman Talib v. Seenivasagam & Anor* [1964] 1 LNS 2; [1965] 1 MLJ 142 where the court held as follows:

> A plaintiff establishes a *prima facie* cause of action as soon as he has proved the publication of defamatory words. It is no part of the plaintiff's case in an action of defamation to prove that the defamatory words are false for the law presumes this in his favour. The words complained of in this case are clearly defamatory in that they tend to lower the plaintiff in the estimation of right thinking men and expose him to hatred, contempt or ridicule. In addition they are calculated to disparage him in the way of his office as a Minister of the Government. The disparagement is therefore presumed to have injured the plaintiff's reputation. In addition in the circumstances in the case of both the slander and the libels the words are actionable *per se* and there is therefore no need for the plaintiff to prove that he has suffered any resulting damage, for such damage is presumed'.

[63] The next case that was cited was *Syed Husin Ali v. Sharikat Penchetakan Utusan Melayu Berhad & Anor* [1973] 1 LNS 146; [1973] 2 MLJ 56 where the court held that the test as to whether a statement was defamatory or not was as follows:

> Thus, the test of defamatory nature of a statement is its tendency to excite against the plaintiff the adverse opinion of others, although no one believes the statement to be true. Another test is: would the words tend to lower the plaintiff in the estimation of right-thinking members of society generally? The typical type of defamation is an attack upon the moral character of the plaintiff attributing crime, dishonesty, untruthfulness, ingratitude or cruelty.'

[64] The plaintiff's counsel also relied upon the decision of the court in *Tun Datuk Patinggi Haji Abdul Rahman Ya'kub v. Bre Sdn Bhd & Ors* [1995] 1 LNS 304; [1996] 1 MLJ 393, where it was held that:

> The test whether the words complained of in the article were capable of being, and were in fact, defamatory of the plaintiff was, whether such words were calculated to expose him to hatred, ridicule or contempt in the mind of a reasonable man or would tend to lower him in the estimation of right-thinking members of society generally. The words complained of in the article were capable of being, and were in fact, defamatory of the plaintiff (see pp. 402H and 403C); *JB Jeyaretnam v. Goh Chok Tong* [1985] 1 MLJ 334 and *Syed Husin Ali v. Sharikat Penchetakan Utusan Melayu Bhd & Anor* [1973] 2 MLJ 56 followed.

[65] It was therefore submitted for the plaintiff that in relation to the actions of off-loading the plaintiff, the defendant's said actions carried a defamatory meaning and would "tend to lower the respondent/plaintiff in the estimation of right-thinking members of society generally".

Whether Slander Was Properly Pleaded

[66] In this appeal, the defendant complains that the plaintiff had failed to set out the exact words that were used by the defendant which constitutes slander of the plaintiff. In response, counsel for the plaintiff replied, first, that this complaint is an afterthought as it was not raised in the court below and not raised in the memorandum of appeal.

[67] Secondly, this case is not about the defendant's words but rather the conduct of the defendant which resulted in the plaintiff being off-loaded and its impact upon the plaintiff as stipulated in para. 6 of the statement of claim which reads as:

> it is further pleaded that on the 23 September 2013, at about 10 am, whilst the Plaintiff was on duty and preparing for her duties at the KLIA International Airport for Flight MH4, Inflight Supervisor Lee Siew Poh, the Second Defendant, approached her and said that the First Officer named Ahmad Abid bin Abdul Hamid, the First Defendant, in the presence of Captain Jalil Syed wanted her to leave the plane and was not given an explanation as to why and that he would not fly the plane if the Plaintiff was around/onboard. The Second Defendant ordered the Plaintiff to leave the flight in a manner which embarrassed the Plaintiff. The flight was delayed for an hour for the Plaintiff to remove her bags at the instructions of the First Defendant.
>
> As a result, the Plaintiff had to leave the plane and suffered embarrassment and was humiliated as the incident was seen by numerous members of the flight crew, passengers and ground staff.

[68] The defendant's response is as stated in paras. 9, 10 and 11 of the defence. They read as follows:

> 9. Defendan Pertama menafikan perenggan 6 Pernyataan Tuntutan dan seterusnya menyatakan bahawa pada 23 September 2013, Defendant Pertama bertugas sebagai Pegawai Pertama di dalam pesawat penerbangan MH4. Setelah melaporkan diri untuk bertugas di Lapangan Terbang Antarabangsa KLIA, Defendan Pertama mendapati bahawa Plaintif akan bertugas bersama dengannya di dalam penerbangan MH4 tersebut.
>
> 10. Defendan Pertama seterusnya memaklumkan kepada Komander penerbangan MH4 tersebut dan Ketua Bahagian Operasi Penerbangan bahawa beliau adalah tertekan secara emosi dan itu akan menjejaskan keupayaan Defendan Pertama untuk menjalankan tugasnya sebagai Pegawai Pertama yang boleh menjejaskan keselamatan penerbangan tersebut memandangkan satu ugutan terhadap nyawa Defendan Pertama telah dibuat oleh Plaintif dan kes tersebut masih di dalam penyiasatan pada masa material.
>
> 11. Selanjutnya pihak MAS telah mengarahkan Defendan Pertama untuk meneruskan penerbangan MH4 tersebut kerana pihak MAS telah mengeluarkan Plaintif dari bertugas di dalam MH4 oleh pihak MAS dan proses mengeluarkan bagasi dari pesawat mengakibatkan kelewatan penerbangan selama hanya 8 minit.

[69] Thus, there was no surprise at all as to what the case was all about. The full facts and circumstances pertaining to the impugned off-loading incident had been clearly and unambiguously set out in the plaintiff's pleadings and duly responded to by the defendant in the defence. The rest is a matter for assessment of evidence and application of the relevant legal principles.

[70] Here, the plaintiff's case is one based on conduct and not the precise words uttered by the defendant. Indeed, given the unique circumstances herein, the words used by the defendant to intimate his insistence that the plaintiff be off-loaded are quite unimportant. What is important is the result that it had on MAS and its eventual impact upon the plaintiff.

[71] In so far as the law of defamation is concerned, parties had proceeded on the basis that a cause of action in slander is sustainable if it is based on defamatory gestures or conduct. But in the course of this appeal, further research has unravelled that the proposition that conduct can amount to slander has not gained acceptance by the Court of Appeal.

Conduct Amounting To Slander

[72] Here, the plaintiff's case is based on conduct amounting to slander. In this regard, counsel for the plaintiff cited a passage from *Defamation-Law, Procedure & Practice*, 3rd edn - David Price and Korieh Doudu where the learned authors opined as follows:

> Defamatory gestures and conduct are slanders. Occasionally claims are brought where the claimant has been physically removed or escorted from the defendant's premises, for example, on the summary termination of employment. It is suggested that the conduct of the defendant or his agents conveys the impression to bystanders that the claimant has been guilty of improper behavior.

[73] However, the Court of Appeal has rejected the proposition that conduct is being capable of amounting to slander. The starting point is *Proton Parts Centre Sdn Bhd v. Mohamed Zainal & Another Appeal* [2010] 1 CLJ 348; [2010] 2 MLJ 207. In that case, the plaintiff's office was sealed and he was prevented by the security personnel from entering his office. He sued his employer for slander. He claimed that the conduct of the security personnel amounted to slander as he suffered humiliation. In that case the Court of Appeal opined at pp. 352-353 (CLJ); p. 212 (MLJ) as follows:

> [10] Learned counsel for the plaintiff, Encik Walter Pereira, submits that the cause of action against the defendants is based on the act of the first defendant in preventing the plaintiff from entering his office, and in sealing his office in the full view of the employees working in the premises.

[11] In urging us to rule that the conduct of the first defendant in sealing preventing the plaintiff from entering his office amounts to slander, learned counsel referred us to a textbook entitled *Defamation Law, Procedure & Practice* (2nd Ed) by David Price wherein the learned author states (at p. 35):

> Defamatory matter communicated by word of mouth is slander except, arguably, when the speaker is reciting from a document. **Defamatory gestures and conduct are slanders.** Occasional claims are brought where the claimant has been physically removed or escorted from the defendant's premises, for example, on the summary termination of employment. It is suggested that the conduct of the defendant or his agents conveys the impression to bystanders that the claimant has been guilty of improper behaviour.

[12] With respect we are unable to accept the above submission. We are of the view that the mere act of the security officer of the first defendant in preventing the plaintiff from entering the premises of his office and in sealing the premises cannot in law amount to tort of slander. There were no defamatory words uttered by the officer concerned, nor any gesture made by him. Therefore, there cannot be a cause of action in slander. **We are unable to agree with the contention that the conduct (as opposed to words and gestures) of a person may amount to slander.**

[13] We have referred to two classic works on the law of tort. However, it appears to us that none supports the proposition as advanced by learned counsel for the plaintiff with regard to conduct. According to *Clerk & Lindsell on Torts* (17th Ed) at p. 1026, paras. 21-28:

> Slander distinguished from libel. Slander is defamation communicated in some non-permanent form by spoken words, or other sounds, or by gestures.

[14] And *Winfield & Jolowicz on Tort* says (14th Ed) at pp. 314-315:

> Liablity for defamation is divided into two categories of libel and slander, and this division has important consequences. A libel consists of defamatory statement or representation in permanent form; if a defamatory meaning is conveyed by spoken words or gestures it is slander.

[15] The above two authorities above appear to suggest that the **tort of slander is confined to words and gestures only. It does not extend to conduct.**

(emphasis added)

[74] The Court of Appeal's proposition that conduct does not amount to slander was followed in the following High Court cases:

(a) *Zulkifli Hussein v. Ambank (M) Berhad* [2015]1 LNS 618; [2015] AMEJ 1077; and

A (b) *Manivannan Muniandy & 2 Ors (Kesemuanya berniaga di atas nama dan gaya Syarikat Percetakan Thirumugam) v. Bank Kerjasama Rakyat Malaysia Berhad* [2014] 5 AMR 481; [2014] AMEJ 0980

[75] It is also interesting to note that in *Siti Salma Yusoff v. CIMB Bank Berhad; Tumpuan Auto Sdn Bhd (Third Party)* [2011] 1 LNS 1621; [2012] B 2 AMCR 276; [2012] 10 MLJ 550, the High Court dismissed a claim for slander based on conduct of the agents of the motor-vehicle financier who had wrongly repossessed the motor-car which under a hire-purchase facility. In that case, the High Court had observed that there was no firm authority on the issue of whether conduct can amount to slander. The case of *Proton* C *Parts Centre Sdn Bhd* (*supra*) was not brought to the attention of the court in that case.

[76] In the present case, the defendant has clearly raised the issue of absence of a cause of action in slander as a point of appeal by way of the memorandum of appeal although I must say that there is no specific D complaint to the effect that "conduct does not amount to slander". The following grounds in the memorandum of appeal are quite relevant to the issue of non-sustainability of a cause of action in slander based on conduct:

1. Hakim Mahkamah Sesyen telah terkhilaf dari segi undang-undang dan fakta apabila membenarkan tuntutan Responden kerana gagal E untuk mempertimbangkan ketiadaan unsur fitnah di dalam tindakan ini. Keperluan untuk membuktikan terdapatnya unsur fitnah tersebut tidak dipenuhi dan dibuktikan oleh Responden.

2. Mahkamah telah terkhilaf dari segi undang-undang dan fakta apabila membenarkan tuntutan Responden kerana tindakan ini F adalah satu tindakan saman malu berbentuk "slander" yang mana pembuktian secara terus berkenaan perbuatan Perayu terhadap Responden harus dibuktikan dengan jelas oleh Responden.

3. Hakim Mahkamah Sesyen telah terkhilaf dari segi undang-undang dan fakta apabila gagal mempertimbangkan bahawa Perayu G bukanlah pihak yang betul untuk guaman ini dibawa sedangkan tidak terdapat sebarang kenyataan atau tindakan Perayu yang menuju atau merujuk kepada Responden.

Stare Decisis

[77] Learned Counsel for the plaintiff submitted that this court was not H bound to follow the decision of the Court of Appeal in *Proton Parts Centre Sdn Bhd* (*supra*), and instead urged upon me to follow the Court of Appeal's decision in *Pardeep Kumar Om Parkash Sharma & Anor v. Abdullah Sani Hashim & Other Cases* [2008] 1 LNS 669; [2009] 2 MLJ 685 CA ("*Pardeep*'s case").

[78] In *Pardeep*'s case, the appellants (husband and wife) were found liable I for having committed slander and for conspiracy. Conspiracy was not pleaded. The pleaded case was that the appellants had uttered words to the

effect that the respondent and his brother tried to kidnap their son. However, the evidence that was led was different from the pleaded case. The other point that was observed by the Court of Appeal in that case was that the respondent had not pleaded that there was a gesture by the appellant (wife) with accompanying instruction to arrest the respondent.

[79] The Court of Appeal held that when a gesture could have the effect of conveying a defamatory imputation, it must be expressly pleaded. Hence, the decision of the trial judge was reversed and the judgment was set aside.

[80] Counsel for the plaintiff in the appeal before me referred to certain passages in the judgment of the Court of Appeal in *Pardeep*'s case which made mention of "words used and accompanying conduct" (see para. 13 at p. 697 of the judgment) and submitted that the Court of Appeal had tacitly approved the proposition that conduct can amount to slander.

[81] However, a perusal of that paragraph will reveal that the Court of Appeal was merely making reference to the observations of the trial judge which cannot of itself be exalted to a firm proposition that conduct can amount to slander. In fact it is clear from a perusal of the judgment in *Pardeep*'s case that the issue as to whether conduct can give rise to slander did not arise pointedly for consideration by the Court of Appeal.

[82] Indeed, it is obvious that the case did not necessitate a consideration of the issue of conduct as the focus of the case was on the words that were uttered by the appellants rather that their conduct. I am therefore unable to accept the argument that *Pardeep*'s case is conflicting decision touching on the same point and that there would be no violation of the doctrine of *stare decisis* if this court were to decline to follow the proposition that was made by the Court of Appeal in *Proton Parts Centre Sdn Bhd* (*supra*).

[83] The next point that was made by counsel for the plaintiff was that the decision of the Court of Appeal was *per incuriam* as the definition of words in s. 2 of the Defamation Act 1957 was not considered. Also, it was pointed out that the Court of Appeal did not have the benefit of the "unreported cases" that were quoted in the footnotes to the passage from the book, *Defamation-Law, Procedure & Practice*, 3rd edn - David Price and Korieh Doudu, namely; See *Mason v. William Hill Organisation Ltd* (unreported), March 16, 1983 and *Watson v. Argles & Court* (unreported) January 1992. However, I do note that it was the second edition of that book which was relied upon by the Court of Appeal. Be that as it may, I should state that this court too did not have the benefit of reading those unreported cases which appeared in the third edition of the book which was referred to during submissions before me. Hence, I will say no more about those cases.

[84] It was also suggested by learned counsel that the decision of the Court of Appeal in *Proton Parts Centre Sdn Bhd* (*supra*) has little value as it was a decision made in the course of a striking out application. I am not sure that the point was well taken. After all, the decision of the Court of Appeal brought finality to the case. And so I do not think that the mere fact that the pronouncement of law was one which was made in the course of a striking out application renders it any less valuable as a case authority which has binding judicial force.

[85] Of course, there may be situations where in the course of interlocutory applications the court may make certain observations on facts and the law and the questions as to whether these observations have the quality of finality and capable of giving rise to a plea of *res judicata* and *functus officio* will depend on the circumstances (see: decision of YA Datin Azizah Nawawi JC in *Code Brilliant Sdn Bhd (Dalam Penerimaan Dan Likuidasi) & Ors v. Heng Ji Keng & Ors* [2012] 1 LNS 873; [2013] 9 MLJ 212).

[86] In my view, even if the decision of the Court of Appeal in *Proton Parts Centre Sdn Bhd* (*supra*) is *per incuriam*, this court is duty bound to follow the decision. (See *Harris Solid State (M) Sdn Bhd & Ors v. Bruno Gentil Pereira & Ors* [1996] 4 CLJ 747; [1996] 3 MLJ 489: *The Co-operative Central Bank Limited (In Receivership) v. Feyen Development Sdn Bhd* [1995] 4 CLJ 300; [1997] 2 MLJ 829). It may of course be different if there are two conflicting decisions of the Court of Appeal, in which case, the High Court can choose either of the two decisions whereas in the case of two conflicting decisions of the Federal Court, the later decision must prevail as it represents the existing state of the law (see *Dalip Bhagwan Singh v. PP* [1997] 4 CLJ 645; [1998] 1 MLJ 1 FC) (at pp. 13 to 14).

[87] In the present case, for the reasons as discussed above, I do not subscribe to the suggestion that was made by counsel for the plaintiff that there are two conflicting decisions of the Court of Appeal such that this court is entitled not to follow *Proton Parts Centre Sdn Bhd* (*supra*). Regardless of my own views on the correctness of the decision, the law is as stated by the Court of Appeal in *Proton Parts Centre Sdn Bhd* (*supra*).

[88] Having said that, I do think however, that there is some merit in the submission that was made by counsel for the plaintiff that the decision in *Proton Parts Centre Sdn Bhd* (*supra*) may have been made *per incuriam*. First, the definition of "words" in s. 2 of the Defamation Act 1957 had not been drawn to the attention of the Court of Appeal. Second, the unreported cases in the footnotes in the passage from the book by David Price and Korieh Doudu - *Defamation-Law, Procedure & Practice*, 3rd edn were not placed before the Court of Appeal for their consideration.

[89] Since delivering my decision on 30 October 2015, I have discovered that in the 4th edition (4th edn) of Duncan and Neill, *Butterworths Common Law Series - Defamation* (published on 28 January 2015) the learned authors have recognised that conduct may amount to slander. This is found in para. 3.05 (p. 22-23) and it reads as follows:

> **Slander: A General View**
>
> **3.05** In general terms slander is defined as the publication of defamatory matter by word of mouth. Defamatory gestures and defamatory sounds such as hissing are also slanders. *In addition there may be occasions where the defendant conducts himself in such a way as to convey a defamatory meaning about the claimant to third persons and thus provides the foundation for an action for slander.* In *Foster v. Customs and Excise Comrs*, Lady Foster sued for **slander by conduct** (and false imprisonment) after she was stopped at Heathrow Airport; her bags were searched and she was then 'marched publicly through the airport's concourses **in a manner which would have meant** to everybody that [she was] being arrested for a serious offence'. (emphasis added)

[90] At any rate, it is obvious that the ruling by the Court of Appeal in *Proton Parts Centre Sdn Bhd* (*supra*), effectively deprives an innocent victim who has suffered tremendous humiliation, of a legal remedy by way of damages for slander from the party responsible for causing reputational harm because of the type of "conduct" which signifies to onlookers that there is something very wrong or sinister about the person. Looking at the situation in totality, I am convinced that if all the relevant legal materials had been placed before the Court of Appeal, the outcome in *Proton Parts Centre Sdn Bhd* (*supra*) may well have been different.

[91] Whatever views that one may hold on this topic, it is clear that there is a glaring and urgent need for this issue to be revisited and the legal position clarified accordingly.

The Outcome

[92] In the circumstances, for the several reasons as discussed above, the ultimate conclusion that I have reached is that by reason only of the doctrine of *stare decisis*, the decision of the Court of Appeal in *Proton Parts Centre Sdn Bhd* (*supra*) is binding on this court and the defendant's appeal must therefore be allowed. The plaintiff's cross-appeal on quantum and costs is therefore dismissed. The entire order dated 29 June 2015 is accordingly set aside. Consequently, the sum of RM25,768 which had been paid into court is hereby ordered to be released to the solicitors for the appellant/defendant forthwith.

[93] For completeness, I must state that if not for the decision of the Court of Appeal in *Proton Parts Centre Sdn Bhd* (*supra*), I would have dismissed the defendant's appeal and allowed the plaintiff's cross-appeal and increased the quantum of damages to RM40,000. I would have also enhanced the trial costs to RM10,000. However, those are now moot points.

A **[94]** Lastly, on the topic of costs here and below, the general rule is that costs will follow the event. However, in this appeal, the decision by the Court of Appeal in *Proton Parts Centre Sdn Bhd* (*supra*) was not placed before the Sessions Court. Also, I note that it did not feature in the original submissions of the defendant during this appeal. It only surfaced after I had
B asked parties to do further research on the issue of whether conduct can amount to slander. In the circumstances, I do not think that the defendant should be rewarded with costs here and below. As such, each party will bear their own costs here and below. The deposit is refunded to the appellant/ defendant.

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